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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 64

JOHN S. BOYLE, Chief Judge of the Circuit Court of Cook County, Illinois; JOHN J. STAMOS, State's Attorney of Cook County, Illinois; JOSEPH I. WOODS, Sheriff of Cook County, Illinois; MAURICE W. LEE and JOHN S. LIMPERIS, Magistrates of the Circuit Court of Cook County, Illinois,

Appellants,

vs.

LAWRENCE LANDRY, ROMMELL MULLER, JOSEPH H. REYNOLDS, DAVID A. REYNOLDS, JAMES WASHINGTON, FRANK DITTO, ROBERT LUCAS, ROBERT BROWN, MICHAEL ROGERS, BERNARD HUGHES, ARNOLD FORD, VISSA MARIE TURNER, WYSINGO TURNER, ANDREW BROWN, CHARLES FLETCHER, JAMES JONES, HERMAN TOWNSEND, JEROME PARKER, RUDY HOOPER, and ACT, an Unincorporated Association,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR APPELLEES

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR APPELLEES

SUMMARY OF ARGUMENT.

The question of appellees' alleged lack of standing to challenge the validity of the intimidation statute should not be considered by this Court because that question is not set forth in appellants' jurisdictional statement nor fairly comprised therein as required by Rule 15.1(c) of the rules of this court. Further, the question was one which must be decided by a single judge from whose decision an appeal must be taken to the Court of Appeals.

The Illinois intimidation statute is an overbroad restriction of freedom of speech and, as such, is invalid.

ARGUMENT.

I.

THE ISSUE RAISED IN APPELLANTS' BRIEF REGARDING THE ALLEGED LACK OF STANDING OF APPELLEES TO CHALLENGE THE VALIDITY OF THE INTIMIDATION STATUTE SHOULD NOT BE CONSIDERED BY THIS COURT.

A. The Question Was Not Set Forth In The Jurisdictional Statement Nor Fairly Comprised Therein As Required By Rule 15.1(c) Of This Court.

Supreme Court Rule 15.1(c) provides in pertinent part that only the question set forth in the jurisdictional statement or fairly comprised therein will be considered by the Court. In its jurisdictional statement, the appellants presented only one question, viz., the validity of the statute. It cannot fairly be said that the issue of standing to sue is "fairly comprised" in this issue.

B. The Question Was One Decided By A Single Judge, From Whose Decision An Appeal Must Be Taken To The Court Of Appeals.

The issue of standing to sue should have been raised on appeal to the Court of Appeals, not to the Supreme Court. 28 U.S.C. § 1253 allows appeals to the Supreme Court only when the matter was required to be heard by a three-judge district court. But the issue of standing is a matter to be decided by a single district judge, not by three judges. In *Idlewild Bon Voyage* v. *Epstein*, 370 U.S. 713, 715 (1962), the court said that "whether the complaint at least formally alleges a basis for equitable relief" is a question for a single judge.

If plaintiffs have failed to allege sufficient facts to demonstrate standing to challenge the validity of a state statute, then the complaint fails to formally allege a basis for equitable relief. Accordingly, if Judge Will erred in denying defendants' motion to dismiss, (a conclusion in which we do not concur), the appeal should have been taken to the Court of Appeals on the issue of lack of standing. By electing to appeal to the Supreme Court of the United States the appellants have waived this issue.

II.

SECTION (a) (3) OF THE ILLINOIS INTIMIDATION STATUTE IS AN OVERBROAD RESTRICTION ON FREEDOM OF SPEECH AND, AS SUCH, IS INVALID.

The court below touched on the distinction between vagueness and overbreadth. It stated (A. 69-71) the difference as follows:

> "The concept of overbreadth, on the other hand, rests on principles of substantive due process which forbid the prohibition of certain individual freedoms. The primary issue is not reasonable notice or adequate standards, although these issues may be involved. Rather the issue is whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution.[41] Frequently, the resolution of this issue depends upon whether the statute permits police and other officials to wield unlimited discretionary powers in its enforcement.[42] If the scope of

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[41] *See* Collings, *supra* note 38 at 196-97.

[42] *See, e.g., Ashton* v. *Kentucky*, 384 U.S. 195, 200-201 (1966); *Shuttleworth* v. *City of Birmingham*, 382 U.S. 87, 90-92 (1965); *Edwards* v. *South Carolina*, 372 U.S. 229, 237-38 (1963).

the power permitted these officials is so broad that the exercise of constitutionally protected conduct depends on their own subjective views as to the propriety of the conduct, the statute is unconstitutional.[43]

"These concepts have particular relevance to statutes touching upon the areas of free speech and assembly. Although the state may regulate speech and assembly where the exercise of these rights conflicts with certain state interests, it may regulate only to the extent necessary to discharge these interests." A vague or overbroad statute, however, is likely to have a deterrent effect which is beyond that necessary to fulfill the state's interests. Rather than chance prosecution, people will tend to refrain from speech and assembly which might come within the statute's ambit.[45]

"Such a deterrent effect on the exercise of these rights is impermissible under the First Amendment." The Amendment was designed not only to protect these rights, but also to encourage their use. Consequently, the requirements of clarity, definiteness, and narrow scope are most strictly observed when a

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[43] *See, e.g., Shuttleworth* v. *Birmingham*, 382 U.S. 87, 90 (1965); *N. A. A. C. P.* v. *Button*, 371 U.S. 415, 433, 435-36 (1963). *See, also*, Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. L. Rev. 67, 75-76, 80-81, 96-104 (1960). *Cf. Baggett* v. *Bullitt*, 377 U.S. 360, 371 (1964); *Smith* v. *California*, 361 U.S. 147, 151 (1961).

[44] *See De Jonge* v. *Oregon*, 299 U.S. 363, 265-66 (1937); *Stromberg* v. *California*, 283 U.S. 359 (1931); *Cf. Yates* v. *United States*, 354 U.S. 298 (1957).

[45] *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-89 (1965); *N. A. A. C. P.* v. *Button*, 371 U.S. 415, 432-33 (1963); *Winters* v. *New York*, 333 U.S. 507, 519-20 (1948); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940); *Herndon* v. *Lowry*, 301 U.S. 242, 261-62 (1937).

[46] *See, e.g., Dombrowski* v. *Pfister*, *supra* at 494-96; *Freedman* v. *Maryland*, 380 U.S. 51, 59-60 (1965); *N. A. A. C. P.* v. *Button*, *supra* at 437; *Thornhill* v. *Alabama*, *supra* at 101-106.

If plaintiffs have failed to allege sufficient facts to demonstrate standing to challenge the validity of a state statute, then the complaint fails to formally allege a basis for equitable relief. Accordingly, if Judge Will erred in denying defendants' motion to dismiss, (a conclusion in which we do not concur), the appeal should have been taken to the Court of Appeals on the issue of lack of standing. By electing to appeal to the Supreme Court of the United States the appellants have waived this issue.

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statute places a possible limitation upon First Amendment rights.[47] Such scrutiny is necessary to provide a buffer between the valid exercise of the police power by the state and excessive restriction of the free dissemination of ideas.[48]

"A number of factors are taken into consideration in determining whether a state regulation meets these standards of clarity and narrowness. Among them are: (1) whether a substantial interest worthy of protection is identified or apparent from the language of the statute;[49] (2) whether the terms of the regulation are susceptible to objective measurement by men of common intelligence;[50] (3) whether those charged with its enforcement are vested only with limited discretion;[51] (4) if penal, whether some element of knowledge or intent to obstruct a state in-

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[47] *E.g., Keyishian* v. *Board of Regents*, 385 U.S. 589, 603-04 (1967); *Cox* v. *Louisiana*, 379 U.S. 536, 551-52 (1965); *Edwards* v. *South Carolina*, 372 U.S. 229, 237-38 (1963); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287-88 (1961).

[48] This rationale has been described most succinctly by Mr. Justice Brennan for the Court in *N. A. A. C. P.* v. *Button*, 371 U.S. at 433: "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *See, also,* Amsterdam, *supra* note 43 *supra*.

[49] *See* Note, 80 Harv. L. Rev. 1773, 1788 (1967).

[50] *See Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967). *See, also,* authorities cited in note 40 *supra* and accompanying text.

[51] *Compare Cox* v. *New Hampshire*, 312 U.S. 569, 575-76 (1941); *with, Shuttleworth* v. *Birmingham*, 382 U.S. 87, 90-92 (1965); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963).

terest is required,[52] and (5) whether its clarity is dependent upon manifold cross-reference to interrelated enactments or regulations.[53]"

The so-called "freedom of choice" notion urged in the brief of the appellants is one which in and of itself could lead to undue restriction of legitimate First Amendment freedoms. This statute is not an extortion statute in the historical sense. Obviously, when public officials are the so-called victims of a violation of this statute, classical First Amendment freedoms are effectively "chilled". The fact that they are effectively chilled with no resulting substantial benefit to the state is the inherent constitutional flaw in Section 12-6(a)(3) of the Illinois Intimidation Statute (Chapter 38, Section 12-6 (a)(3) Ill. Rev. Stats. 1967).

It is clear that the statute as it now exists would encompass any direct action or protest activities of the appellees directed at political, economic and social institutions who would and should be pressurized to meet appellees demands to end racial discrimination. The references in appellants' brief to other federal and state

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[52] *See Adderley* v. *Florida*, 385 U.S. 39, 42-43 (1967). *See also, Cox* v. *Louisiana*, 379 U.S. 559 (1965), wherein a Louisiana statute regulating picketing in or near a court house "with intent to interfere" with the administration of justice was upheld as valid on its face. On other occasions, the Supreme Court when holding a statute unconstitutional has emphasized the fact that the law reached innocuous acts. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 599-601 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360, 368-72 (1964). Moreover, the Supreme Court has held on a number of occasions that a conviction based upon membership in a group which pursues illegal ends requires a specific intent to further such ends. *See Elfbrant* v. *Russell*, 384 U.S. 11, 19 (1966); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 285-87 (1964); *Noto* v. *United States*, 267 U.S. 290, 299-300 (1961). *Cf.* Collings, *supra* note 38 at 227-231.

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[53] *See Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967).

extortion statutes (pp. 24-28) has very little relevance here in light of the fact that the intimidation statute is much more broad and vague than the classical crime of extortion. Under the "freedom of choice" banner the appellants seek to tighten the political noose around any individual or group who seek to change the existing political order through the method of direct action and protest activities thereby elevating what would ordinarily be a misdemeanor (if carried through to fruition) to a felony with a penalty of up to five years in the penitentiary and a fine not to exceed $5,000.00 or both. Public officials are not so timid that they need this kind of stick to assure their "freedom of choice". There can be no question but that the examples cited by the court below fall within the shadow of the intimidation statute, to-wit, threats by dissentient groups to engage in disorderly conduct; threats by residents of a high crime neighborhood to carry concealed weapons for their own protection; and threats by mothers to block a dangerous state highway to demonstrate the need for increased safety measures (A. 94). The court below concluded that the phrase "commit any criminal offense" is so broad as to include threats to commit misdemeanors punishable by fine only. The court noted that these evils are not so substantial that the state's interest in prohibiting the threat of them outweighs the public interest in giving legitimate political discussion a wide berth. The court concluded that that language was an overbroad restriction on freedom of speech and therefore invalid. It noted that if the threat is carried out, the persons who violate the criminal law by their acts are subject to punishment (A. 94, 95).

The court below pointed out (A. 88, 89):

> "Legitimate political expression intended to secure changes in society's legal, political, social, or economic structure frequently takes the form of expressions about future events or conditions. Such expression may be in the form of promises, predictions or warnings, or threats of lawful action.
>
> "While we doubt that threats of the character prescribed by the Illinois Intimidation statute are legitimate forms of expression, the point at which legitimate expression becomes coercive expression of unlawful intent is not easily determined, especially in the heat of public debate. The freedoms of expression, however, are extremely vulnerable to excessive restriction.
>
> 'The threat of sanctions may deter their exercise almost as potently as the actual application of the sanctions . . . Because the First Amendment freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity.' (*N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963). See, also, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271-72 1964; *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1940)) The necessity for such 'breathing space' requires that only threats of substantial evil be proscribed. (See, e.g., *Dennis* v. *United States*, 341 U.S. 494, 507-510 (1951); *Martin* v. *Struthers*, 319 U.S. 141, 143-44 (1943); *Schneider* v. *State*, 308 U.S. 147, 161 (1939))"

Simply stated, it serves no useful function to broaden a statute to the point of chilling legitimate political dissent in order to get at the evils of the crimes of blackmail and extortion. Thus the Illinois Intimidation Statute is constitutionally invalid.

CONCLUSION.

For the above and foregoing reasons, appellees respectfully request that the decision of the trial court as to the unconstitutionality of Chapter 38, Section 12-6(a)(3) of the Illinois Intimidation Statute, Ill. Rev. Stats. 1967, be affirmed.

Respectfully submitted,

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APPENDIX

ERRATUM: The second paragraph on page 88 of the appendix filed in this cause should read as follows:

This statute is an omnibus provision designed to prohibit all manner of threats and unlawful communications intended to compel a person to act against his will. (Footnote 88) The State of Illinois unquestionably has a legitimate interest in protecting persons from coercion by threats, *even though expression is involved.* "*[I]t has never been deemed* an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried by means of language, either spoken, written, or printed." (Footnote 89) (Emphasis added)